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Neil Walker: The Case Against the Case Against the McCluskey Report

Posted on March 21 2013

A shorter version of this first appeared in Scottish Review Online on 21/3/2013, in response to articles by the Review's editor, Kenneth Roy, criticizing the McCluskey Report on the regulation of the Scottish press, and in answer to the accompanying 'Petition for Free Speech in Scotland'

I have never met Kenneth Roy, but have long been an admirer of his journalism. I am a Friend of the [Scottish Review](#) and sing its praises to any and all who will listen. Scottish public life is appreciably the healthier for its distinctive mix of intrepid investigative journalism, dogged campaigning and irreverent (and often extremely funny) comment on the pretensions, evasions and silences of many who are prominent in Scottish affairs. The question of 'friendship' is one to which I will return below.

I am also a member of the Expert Group, chaired by Lord McCluskey, which reported last week on [Leveson in Scotland](#). This report has been condemned by Kenneth Roy as 'shameful' and 'disgraceful', as presaging a 'totalitarian future'. He sees it as a clear threat to the freedom of the press. He believes that its recommendations would jeopardise just that brand of fearless journalism and critical comment that is the Review's trademark. He has launched a petition asking for its wholesale rejection.

The Review's 'petition for free speech in Scotland' specifically opposes the system of 'compulsory registration.... proposed by Lord McCluskey's 'expert group' (and, no, I am not offended - I would be happy if 'expertise' were always in inverted commas). As a point of initial clarification, I would note that our scheme is specifically opposed to registration, compulsory or otherwise. We do not believe that anyone needs to be licensed before they can publish, or should be deprived of a license to publish if they do not abide by the licensing rules. We would see that as an unacceptable form of prior, and, indeed, continuing control. Instead, we favour a system in which all relevant media organs, by the very nature of what they do, are automatically and indefinitely covered by the specific and limited rules of the Leveson system.

For some, no doubt that will be seen as a form of 'compulsion' even worse than 'registration'. But what we are talking about here is the everyday 'compulsion' of the law. In our various work and other activities, most of us, by the very nature of what we do, are 'compelled' by law in some respects. I certainly am as a university teacher, as, indeed, journalists already are in matters such as contempt of court. It is, in fact, the normal way of legal regulation not to allow opt-ins or opt-outs from the relevant jurisdiction that has been created. So what we propose crosses no Rubicon in media law or elsewhere towards a novel and oppressive *form* of regulation. Of course, some may, and some do still disagree with the *substance* of our proposals. It is to that larger question that I now turn.

How, then, can I square my support for Scottish Review and all it stands for with my endorsement of the substance of the McCluskey Report? A good place to start would be with what Leveson actually proposes. This, like the detail of our attempt to refine its implementation, has received curiously little attention in the heat of recent debate.

Leveson recommended a dual framework for press regulation. First and foremost, there should be a new Regulatory Body, designed and funded by the press itself, and with a membership and appointment mechanism strictly independent of government but with some press representation. This Body would be responsible, in Leveson's words, 'for promoting high standards of journalism and protecting the rights of individuals'; in particular, for avoiding a repetition of the kind of incidents - of which the Millie Dowler phone-hacking affair was an extreme example - that led to the appointment of Leveson in the first place. The new independent regulator would adopt a Standards Code which would cover the same basic content as the existing Editors' Code under the Press Complaints Commission, addressing questions of intrusive investigation, respect for privacy and reporting accuracy. It would, however, provide a fuller complaints and remedies procedure than its predecessor, roundly condemned by the vast majority of parties who gave evidence to Leveson - from the Prime Minister down - as a toothless tiger.

In a graduated arrangement, the focus of the new Regulatory Body would be on ensuring that individual organs of the press had their own adequate and speedy complaint-handling process. But on the occasions, hopefully rare, where that did not suffice, it would have an independent jurisdiction to hear and decide on complaints. If a complaint was upheld, it would have the power to direct appropriate remedial action, including the publication of corrections and apologies, and, as a last resort, the payment of financial sanctions.

The aim of the proposed new Regulatory Body, in short, was not to muzzle the press in terms of its vital tasks of informing the public and holding power to critical account. Rather, it was to provide more effective means to ensure that the press did not overstep the mark by resort to the kind of unnecessary harassment, significant inaccuracies or intrusions into personal grief or shock which, by its own word,

the Editors' Code already roundly condemns.

Leveson also recommended that there should be a Recognition Body, its sole objective being to ensure that the Regulatory Body is fit for purpose. Periodically, it should certify that the relevant self-regulatory mechanisms are in place, and that they cover all significant publishers. Unlike the Regulatory Body, the Recognition Body should be anchored in statute, so signalling Parliament's enduring commitment to the new system.

With all of this we are entirely in agreement. And we also fully concur with Leveson's view that the Recognition Body should be as independent of government and the press as the Regulatory Body itself. Accordingly, we recommended that, if the decision were taken to have a separate Scottish Body, then, while formally appointed by the Scottish ministers, the selection of the Recognition Commissioner (like many other public offices) should be overseen by the Scottish Public Appointments Commissioner to ensure fairness and transparency.

Unlike Leveson, however, we concluded that, if the scheme is to work as intended, no significant player should be allowed to opt out. We were not persuaded that the carrots offered by Leveson, such as the kite mark for members and protection against costs in any consequential court proceedings, were sufficient to ensure that those not otherwise minded to join the club would do so. Instead, looking to the past experience of the Press Complaints Commission and of similar bodies elsewhere, such as in Germany, we concluded that a voluntary system would create perverse incentives. Those not willing to engage from the outset, as well as those who might lose their appetite for engagement after the fact, could simply walk away. Indeed, in the system proposed they could even take the ball home and stop everyone else from playing, since the Recognition Body, by Leveson's own criteria, would simply not be able to certify as fit for purpose any Regulatory Body lacking key press organs. A voluntary system, in short, would be a standing invitation to throw a spanner in the works. That view has only been reinforced by the evidence of foot-dragging and backsliding amongst the London-based media, and some of their political friends, in the weeks and months following Leveson, and by the outrage which has accompanied each and every recent proposal for moving forward with which the press are not in full agreement.

The other area in which much has been made of our departure from Leveson concerns the definition of the press for the purposes of the new regulatory scheme. Leveson targets all news and periodical publishers, including news publishers online. We use the same general approach, but in so doing flag up the difficult question of social media. Here there is a genuine regulatory dilemma, but not one we should run away from. We live in a world where the forms of virtual communication develop at bewildering speed. There is no doubt, as Leveson acknowledges, that the kinds of harms his inquiry was set up to address can be perpetrated on line as much they can in print.

Yet clearly not every amateur blogger or tweeter who passes on an unsubstantiated and unflattering rumour should be subject to complaint and the possibility of sanction. This would be both unduly intrusive and unworkable. Instead, hard questions have to be asked and answered about who precisely constitutes a relevant news-related publisher for the purposes of the Regulatory Body and its Standards Code. We do not pretend to have a definitive answer to this question. That, as we emphasise in our Report, is finally a question for the legislature rather than for us. Whoever decides the question, there will doubtless be difficult cases at the margins, but surely better an approach that looks to purpose and impact rather than form, and which anticipates the future shape of news production and dissemination rather than relying on an increasingly outdated model.

We are accused by Kenneth Roy and others of riding roughshod over human rights. What we try to do instead, in full compliance with the European Convention on Human Rights, is to find the right balance between different and equally vital rights - both the right to freedom of expression and the right to privacy. The Code of Practice which the Regulatory Body is charged with implementing will explicitly safeguard the role of the press in exposing crime or impropriety, protecting public health and safety and preventing the public from being seriously misled. No journalist acting from these purposes, or otherwise in the public interest, will be any more liable to sanction under the system we propose than under the present framework.

Obviously, real concerns remain. The freedom of the press is so vital that any new regulation must be rigorously scrutinised, not least by the press themselves, to ensure that it does not have an undesirable chilling effect. We would expect nothing less. The various appointments to the new bodies should be closely examined, as should be the proposed content of the Code to ensure, as Leveson proposes, that it goes no further in its coverage than is already contained in the Editors' Code. And the operation of the Regulatory Body, including the question of the burden of funding, should be the subject of continuous monitoring.

But in so doing we must surely acknowledge that we cannot deal in the language of absolutes. The regulation of the press is and always has been about the balancing of different goods rather than the continual reassertion of one. Statutory regulation, as, for example, the case of Denmark has shown (where a statutorily addressed press is one of the most robust in Europe), does not tip the balance towards censorship. The devil is always in the detail of regulation, not its vehicle.

Lord McCluskey is perfectly capable of looking after himself, but I must defend him from one charge. Kenneth Roy speaks of his false reputation as a 'friend of Scottish journalism'.

Really? Is that how we are to be judged? Either as friends, or presumably, as enemies of Scottish journalism? Either unequivocally 'one of us' or one of the bad guys?

Surely there is a better test; namely whether we take seriously the rights of a free press and of private citizens alike and remain committed to finding the right balance. I think all members of our committee, including its two lifelong journalists, pass that test. We also think our proposals pass that test. We do not believe these proposals, or the alternative proposals tentatively agreed in London this week, would have the consequences of which Kenneth Roy speaks. We do not believe they would have prevented the exposure of Keith O'Brien, or the breaking of any of the other recent stories of public interest which we have been accused of seeking to repress.

Leveson remains a valuable piece of analysis, timely in its diagnosis, well-balanced in its purpose and, for the most part, realistic in its practical assumptions. In trying to find a way of making it work I believe that we are truer to its underlying purpose than an approach that continues to judge the adequacy of press regulation first and foremost in terms of its acceptability to those whom it is intended to regulate. No-one else gets to be judged by that standard. And, of course, no other sector of public life or of civil society gets to host and 'edit' the debate that shapes public understanding over what is at stake in its own regulation.

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